

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-2048

AUG - 1977

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

* PLEASE RETURN TO *
* RECORDS ROOM *

HAROLD EDWARDS,

Petitioner/Appellant

DOCKET NO. 77-2048

vs.

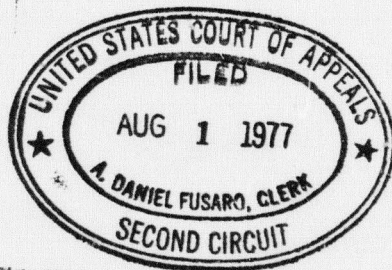
UNITED STATES OF AMERICA,

Respondent/Appellee

B
P/S

Brief and Appendix

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW
YORK D.C. CIVIL NO. 76 CIV 5026 (CMM)



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

HAROLD EDWARDS,

Petitioner/Appellant

DOCKET NO. 77-2048

vs.

UNITED STATES OF AMERICA

Respondent/Appellee

BRIEF OF THE APPELLANT

JURISDICTION:

This appeal is taken from an ORDER denying Appellant's Motion to Vacate Sentence, filed pursuant to 28 U.S.C. § 2255 in the United States District Court for the Southern District of New York, in 76 Civ. 5086, entered on January 24, 1977, and enclosed herein as APPENDIX I. Permission to proceed with this appeal in forma pauperis was granted and the Brief is timely submitted without Appendix, on the original Record since the Court below did not furnish Appellant copies of the Record on Appeal or supporting Docket Entry Sheet.

STATEMENT OF THE CASE:

The case on appeal arises from the filing of a Motion to Vacate Sentence imposed on February 20, 1975, after a plea of guilty to the charges in Criminal Indictment 74 Crim. 592. The Appellant was arrested by the State of New York on June 28, 1974, and a detainer was lodged against him with the State of New York by the United States Authorities for the instant offense on June 29, 1974. The Appellant was charged with a violation of the Federal Bank Robbery Statute 18 U.S.C. 2113(a) & 2. The Appellant remained in custody of the State of New York and on December 15, 1974 was brought to the United States District Court for the Southern District of New York by a writ of habeas corpus ad prosequendum for the setting of bail, and returned to the State's custody at Riker's Island the same day. On January 8, 1975, the Appellant was once again produced at the United States Courthouse Foley Square by writ of habeas corpus for plea and arraignment from the State's custody and again returned to the custody of the State of New York at Riker's Island. On February 20, 1975, the Appellant was once again produced in the Southern District of New York for the purpose of sentencing, by a writ of habeas corpus, and again returned to the custody of the State of New York at Riker's Island.

The Judgment of Commitment entered by the Honorable Charles M. Metzner, U.S.D.J. on February 20, 1975 in 74 Crim. 592, states, in pertinent part, as follows:

"The defendant produced in Court on a writ of Habeas Corpus and entered a plea of guilty.....

"It is recommended that the Attorney General pursuant to Section 4082 of Title 18 U.S.C., arrange to have this sentence served concurrent with the sentence the defendant is presently serving which sentence was imposed on February 13, 1975, in New York State Criminal Court, in far (sic) as the time that can be served concurrently can be served. If the Attorney General agrees with this recommendation the balance of this sentence, if any, will be served in a Federal Institution to be designated by him... Writ satisfied....."

A sentence was imposed on the plea of guilty to a term of ten (10) years in violation of 18 U.S.C. § 2113(a) and 2.

Subsequently, the Appellant was released from the custody of the State of New York, taken into custody under the Judgment of Conviction imposed in the instant case, and thereafter incarcerated at the United States Penitentiary, Atlanta, Georgia.

On September 15, 1976, the Appellant filed the instant Motion to Vacate Sentence, and Show Cause was issued to the United States Attorney's Office for the Southern District of New York, who submitted a Response to the Show Cause, through Robert B. Fiske, Jr., Assistant United States Attorney, and on the 27th day of December, 1976, the Appellant filed a Traverse to the Government's Response. Thereafter, on January 24, 1977, Judge Charles M. Metzner, entered an ORDER denying the Motion to Vacate without a hearing. In the ORDER denying the Motion (APPENDIX I ATTACHED) the Court primarily relied on the premise that the plea of guilty to the indictment on January 8, 1975 waived any claim of jurisdictional loss, and the Appellant's failure to make a timely objection prior to the entry of the plea of guilty waives

any collateral attack on the Judgment and Sentence, and it was therefore not necessary to determine whether the Government violated the provisions of the Interstate Agreement on Detainers Act, 18 U.S.C. App. (Pub. L. 91-538, §§ 1-8, December 9, 1970).

This appeal, although based primarily on the Denial of the Appellant's Motion to Vacate Sentence that alleged specifically:

A. Par. 2 of Motion to Vacate:

"That the conviction and sentence is Constitutionally invalid null and void, in that the Court was without jurisdiction to impose the sentence and enter the Judgment of Commitment in Criminal Case No. 74 Cr 592 due to the Government's failure to comply with the provisions of the Interstate Agreement on Detainers Act, Pub. L. 91-538, 18 U.S.C. App. P. 167 (1975 Supp.), as more fully set forth in the attached Memorandum of Law made a part of this Motion by reference."

B. Par. 3 Motion to Vacate:

"That the failure of the Government to comply with the above noted law nullifies the total proceedings had herein and mandates a dismissal of the indictment with prejudice (Art. IV(E))."

The Government in response to the ORDER to Show Cause expanded the issue presented to the District Court stating in their response at the pages noted, the following issue not raised in the Motion to Vacate:

Page 1 - Government's Response:

"Defendant Edwards has "moved" in this criminal case, pursuant to 28 U.S.C. § 2255,* for an order vacating the sentence imposed upon him, permitting him to withdraw his plea of guilty and dismissing the indictment upon which his plea was premised."

"* Procedurally, it is arguable that defendant should have first filed a motion pursuant to Fed. R. Cr. P. 32(d), and then, if unsuccessful, pursued his habeas remedies under 28 U.S.C. § 2255. However, because a Rule 32(d) motion should have most certainly failed, the Government has no objection to proceeding under 28 U.S.C. § 2255 at this time. Technically, of course the application under 28 U.S.C. § 2255 should have been filed as a separate civil action in this court. However, in order to get to the merits, the Government has no objection to the Court's deeming this application as properly filed, and will so treat it in this memorandum."

Page 2 - Government's Response:

"The Government opposes defendant's application, since the defendant's plea of guilty constituted a waiver of any issues under the Act."

Page 3 - Government's Response:

"Edward's guilty plea waived any rights he may have had under the Act." "It is well settled that an indictment may not be collaterally attacked under § 2255 except for lack of jurisdiction or infringement of defendant's constitutional rights. (Citations Omitted)."

In a footnote on page 3:

"While the Government does not rely in chief upon the status of the writ during the trips back and forth from Federal Court to Riker's Island, we do call the Court's attention to a recent decision of Judge Goebel..... One ground for the Court's decision was that since the writ in that case had never been satisfied, the defendant had never legally been returned to the custody of the State..."

Page 5 - Government's Response:

"Furthermore, even if there was a question as to personal jurisdiction, defendant's guilty plea waived it."

"The remaining question here, then, is whether there was another kind of jurisdictional defect based on the Act so serious as to require this Court to notice it at this late stage in the proceedings. The Government submits that there was not...."

Page 7- Government's Response:

"Edward's should have asserted his claim under the Act in the period immediately preceding the date of his guilty plea. This Court should not allow the post-conviction habeas corpus procedure to be used in such a way as to resurrect procedural challenges which have already been waived by the defendant." *

"* Finally, it should be noted that the rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision....."

Therefore, the Government expanded the Motion to Vacate Sentence stating that the Motion should first have been submitted as a Rule 32(d), Federal Rules of Criminal Procedure, Motion to withdraw plea of guilty and was improperly considered absent the assignment of a Civil Docket Number (However, this statement is refuted by the record since a Civil Docket Number had been assigned - - 76-CIV-5026(CMM)). Further, that the defendant's plea of guilty constituted a waiver of any issue under the Act. That an indictment may not be collaterally attacked under § 2255 except for lack of jurisdiction or infringement of constitutional rights. That the writ of habeas corpus was never satisfied, therefore, the appellant had never been returned to the custody of the State. That the Court should not allow the post-conviction attack to be used to attack procedural deficiencies (i.e., voluntariness of the plea). Even though the Government presented allegations not presented by the appellant in the Motion, the Court perfunctually denied the Motion without permitting the appellant to refute the issues raised by the

Government. All of which is inconsistent with the provisions of 28 U.S.C. § 2255.

STATEMENT OF THE ISSUES OF APPEAL:

The Appellant contends that the District Court denied the Motion to Vacate Sentence solely on the basis that the plea of guilty waived the Appellant's right to contest the Government's violation of the Interstate Agreement on Detainers Act, 18 U.S.C. App. (P. Law 91-538, §§ 1-8, December 9, 1970), hereinafter referred to as "The Act". This conclusory opinion was made without permitting the Appellant the right to reply to the Government's expanded allegations in their response to the ORDER to Show Cause, and is contrary to the acceptable procedure set forth in 28 U.S.C. § 2255.

QUESTIONS PRESENTED ON APPEAL:

- I. THE DISTRICT COURT ERRED BY DENYING THE APPELLANT'S MOTION TO VACATE SENTENCE WITHOUT ORDERING AN EVIDENTIARY HEARING.
- II. THE FAILURE OF THE GOVERNMENT TO COMPLY WITH THE PROVISIONS OF THE INTERSTATE AGREEMENT ON DETAINERS REQUIRES REVERSAL.

ARGUMENTS AS TO ISSUES ON APPEAL:

ISSUE (I) RESTATED:

I

THE DISTRICT COURT ERRED BY DENYING THE
APPELLANT'S MOTION TO VACATE SENTENCE
WITHOUT ORDERING AN EVIDENTIARY HEARING.

The Appellant submitted a Motion to Vacate Sentence, pursuant to 28 U.S.C. § 2255, seeking a discharge from the illegal incarceration and dismissal, with prejudice, of the charges under the indictment.

The Government responded to the Court's Show Cause ORDER contesting the propriety of a collateral attack without first withdrawing the plea of guilty, and further contending that the Appellant's failure to raise the issue prior to sentence effectively waives the Appellant's right to collaterally waive the issue. Additionally, the Government contended that since the writ of habeas corpus was not satisfied the Appellant was never "legally" returned to the custody of the State of New York.

Since a response to an ORDER to Show Cause requires the Government to restrict its response solely to the facts from the "Motion, and the Files, and the Records of the case", the Court's failure to conduct an evidentiary hearing, allowing the Government's response to be submitted with allegations "off the record" and unrefuted by Appellant was plain error, since the response contained statements clearly unsupported by "The Motion, The Files, and the Record of the case". "Personal reflections, interpretations and reflections, reduced to writing are not to be presumed a part of the trial records". Halliday v. United States, 380 F. 2d 270.

In Tompond v. Sain, 372 U. S. 293, the Supreme Court noted that an evidentiary hearing is required where the circumstances indicate that a decision could not be made from the Files and the Records of the case. Since the Government's response (Page 7 - Government's Response - Page 5 of this Brief), stated that the plea was voluntarily and intelligently submitted and precludes a later attack on procedural challenges is a conclusion not supported by the records and files of the case and requires an evidentiary hearing to determine if the Records support the allegation that the plea was voluntary. See also, Machibroda v. United States, 368 U. S. 487; Stidman v. Wingo, 452 F. 2d 759.

In United States v. McGee, 355 U. S. 17, the Court held that the plea maybe a voluntary act of a defendant, yet not made with understanding and thus be subject to vacation. See Also, United States v. Antoine, 434 F. 2d 450 (2nd Cir. 1970).

Since a collateral attack on a sentence under 28 U.S.C. § 2255 holds that a conviction may be contested if such conviction and sentence is contrary to the "Constitution and laws of the United States"; such an attack would be proper as in this cause, where subsequent decisions strengthened the interpretation of the "laws of the United States". See, Sanders v. United States, 373 U. S. at 17, where the Court held:

"If purely legal questions are involved, the applicant may be entitled to a new hearing upon showing of an intervening change in the law or some other jurisdictional factor having failed to raise a crucial point or argument in a prior application."

Also see, Kaufman v. United States, 394 U. S. 217; Davis v. United States, 472 F. 2d 596.

Further, this Court should be mindful of the Rule enunciated by the Supreme Court in Haines v. Kerner, 404 U. S. 519, 92 S. Ct. 594, 30 L. Ed. 2d 650 (1972), wherein the Court stated that pro se complaints are to be held to less stringent standards than formal pleadings drafted by lawyers. Also, in Govington v. Cole, 528 F. 2d 1365, 1373 (5th Cir. 1976), the Court held:

"Technical rigidity in reviewing pleadings must be eschewed, and we must remain extremely tolerant of the juristically unlearned as they seek to articulate their belief that they have suffered deprivations of constitutional rights."

Consequently, when the Government's response alleged the Motion was:

(1) Procedurally incorrect; (2) Incorrectly raising an issue that was waived as being untimely; (3) in error since the plea was voluntary; (4) was in error claiming loss of jurisdiction by failure of the Government to comply with "The Act" since the Appellant was never legally returned to State custody until the writ was satisfied. All of these expanded allegations raised by the Government after the Court ORDERED a "show Cause" went "beyond the record" and mandated an evidentiary hearing.

ISSUE (II) REITERATED:

II

THE FAILURE OF THE GOVERNMENT TO COMPLY
WITH THE PROVISIONS OF THE INTERSTATE
AGREEMENT ON DETAINERS REQUIRE REVERSAL.

The appellant stated in the Motion to Vacate that the Government violated the provisions of "The Act", thereby, causing the Court to be without jurisdiction to accept the plea of guilty; enter the judgment; and impose sentence, and the Appellant is, therefore, being illegally detained. The Court in it's ORDER (APPENDIX I ATTACHED) failed to consider the enlarged issues raised by the Government in their response to the order to show cause, and based it's denial solely on the fact that the appellant's plea of guilty to the indictment waived all non-jurisdictional defects without submitting a finding of facts, supporting the statement that the alleged error was non-jurisdictional, stating that the Court had proper subject matter jurisdiction under the offenses charged, and obtained personal jurisdiction over the appellant at the arraignment on December 18, 1974. The Court failed to properly consider that although he may have subject matter, and personal jurisdiction to proceed to judgment and sentence at the commencement of a criminal proceeding, such jurisdiction may be lost by subsequent actions of the Court and/or it's Agents that cause the jurisdiction to be waived. In the instant case personal jurisdiction was lost after arraignment on December 18, 1974, by the failure of the Court and/or the Government to retain the appellant in federal custody until the completion of the prosecution under the charges giving rise to the detainer lodged with the State of New York.

Therefore, the question that is at issue on this appeal is not whether the plea of guilty acted as a waiver to raise the loss of jurisdiction

issue, but whether the sentence was imposed and the judgment rendered by the Court who properly retained jurisdiction to impose the sentence. To answer this question a determination must be made as to: (1) was the proceeding controlled by "The Act"; (2) If so, did the Government violate the conditions of "The Act"; (3) is the protection of the provisions of the act waived by a defendant's failure to timely object; (4) is a conviction obtained from a plea of guilty any more uncontested than a verdict of guilty by jury.

The decisions of the various higher Courts, subsequent to the final adjudication of the instant cause, materially clarifying the provisions of "The Act". See, United States v. Cyphers, 20 Cr. L. 2468 (CA-2, 2/8/77); United States v. Mauro, 414 F. Supp. 358 (S.D.N.Y. 1976), aff'd. Slip Opinion at 265 (2nd Cir. Oct. 26, 1976); McCola v. Groves, 520 F. 2d 830 (3rd Cir. 1975); United States v. Cappucci, 342 F. Supp. 730.

The Court below held that Mauro, supra, was not applicable in the instant case since Mauro had not plead guilty and had made timely application after being returned to State custody.

Article IV(B) of "The Act" controverts the District Court's interpretation of "waiver", or of a guilty plea being more restricted than a verdict of guilty, and further does not stipulate that a Motion must be made prior to plea or the protection will be waived. Section IV(B) states, in pertinent part, as follows:

"If trial is not had on any indictment, etc. contemplated hereby prior to the prisoner's return to the original place of imprisonment pursuant to Article V(e) hereof, such indictment etc. shall not be of any further force and effect, and the Court shall enter an order dismissing the same with prejudice."

Obviously a strict interpretation of "The Act" would require a dismissal of the indictment by the Court's own Motion, and clearly reflects the waiver noted by the Court below has no bearing on the requirements of the law.

The records conclusively show that:

- (1) The State of New York arrested appellant on June 28, 1974 and maintained continuous custody of the appellant throughout the contested proceedings.
- (2) The Government triggered the application of "The Act" by filing a detainer with the State on June 29, 1974.
- (3) December 15, 1974 - The Appellant was first removed from State custody for setting bail and returned to State custody.
- (4) January 8, 1975 - The Appellant, for the second time was removed from State custody for plea and arraignment and returned to State custody.
- (5) February 20, 1975 - The Appellant, for the third time, was removed from State custody for sentencing and returned to State custody.

Therefore, the Court below was in violation of "The Act", Article IV(E) on December 15, 1974, when it failed to enter an ORDER

dismissing the indictment since the Court caused the appellant to be returned to State custody prior to fully disposing of the charges under the detainer.

Simply stated, the ORDER of the Court denying the Motion to Vacate Sentence is contrary to law, and is therefore invalid, null and void.

Appellant prays that this Honorable Court reverse the ORDER of the Court below, remand the cause to the District Court with instructions to vacate the sentence, set aside the judgement of commitment, and dismiss the Indictment with prejudice.

151 Harold Edwards
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Atlanta, Georgia 30315

Sworn to and subscribed before me this
26th Day of July, 1977.

Parole Officer: Authorized by the Act of July 7, 1955 to Administer Oaths (18 U.S.C. 4203)

PROOF OF SERVICE:

I, Harold Edwards, hereby certify that I am the Appellant in the foregoing "Brief Of The Appellant", and that I have served a copy of said Brief upon Mr. Sarah Schrank Gold, Assistant United States Attorney, for the Southern District of New York, United States Courthouse, Foley Square, New York, New York, by placing same in the United States Mail in a duly addressed envelope, with postage fully prepaid, at the United States Penitentiary, Atlanta, Georgia, on this 26th day of July, 1977.

101 Harold Edwards
Harold Edwards, 170 St

STATE OF GEORGIA)
COUNTY OF FULTON)

born to and subscribed before me this

26th Day of July, 1977.

Charles C. Moore
Parole Officer Authorized by the Board

Officer: Authorized by the Act of
July 7, 1955 to Administer Oaths (18 U.S.C. 3604)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

F I L E D

Jan 25 2:25 P.M. '77

-----X
HAROLD EDWARDS,

Petitioner,

:
: 76 Civ. 5026
: (CMM)

-against-

UNITED STATES OF AMERICA,

:
: Respondent.
:-----X

NYTHER, D.J.:

This is a motion pursuant to 28 U.S.C. § 2255 to vacate the sentence and judgment of commitment entered against petitioner in 74 Cr. 592 (S.D.N.Y.) on February 20, 1975. Petitioner now contends that this court lacked jurisdiction over his person and thus could not impose sentence upon him since the government produced him in violation of the provisions of the Interstate Agreement on Detainers Act, 18 U.S.C. App. (Pub. L. 91-538, §§ 1-8, December 9, 1970) ("The Act").

There is no need to discuss whether the government in fact violated the Act. Edwards pled guilty to count I of the indictment on January 8, 1975. As has often been noted by this circuit, "(a) plea of guilty to an indictment is an admission of guilt and a waiver of all non-

jurisdictional defects." United States v. Spada, 331 F. 2d 995, 996 (2d Cir. 1964), cert. denied, 379 U.S. 865 (1965). This Court having proper subject matter jurisdiction, also obtained personal jurisdiction over Edwards when he was arraigned on December 16, 1974. Petitioner's claim that the court lost personal jurisdiction when he was returned to state custody should have been made prior to the entry of his plea of guilty. Failing to make a timely objection, his claim was thus waived.

Petitioner's reliance upon United States v. Haura, 411 F. Supp. 358 (E.D.N.Y. 1976), aff'd, Slip Opinion at 265 (2d Cir. Oct. 26, 1976), is misplaced. In that case the accused had not pled guilty and had made timely application after being returned to state custody.

Petitioner's motion is denied.

So ordered.

DATED: New York, N.Y.
January 24, 1977

CHARLES B. METZGER

U. S. D. J.

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